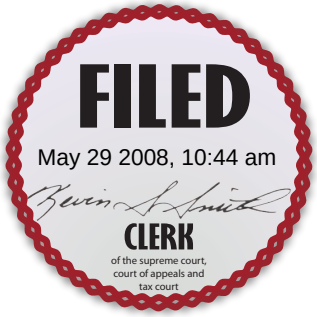

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IN THE
COURT OF APPEALS OF INDIANA

MICHAEL A. QUILLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 05A02-0701-CR-95
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BLACKFORD CIRCUIT COURT
The Honorable Bruce C. Bade, Judge
Cause No. 05C01-0504-FA-12

May 29, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Michael A. Quillen appeals his convictions and sentence for five counts of child molesting,[1] one as a Class A felony and four as Class C felonies. He raises five issues on appeal, which we restate as:

I. Whether fundamental error resulted when the trial court permitted the admission of Quillen's statements to police.

II. Whether the trial court abused its discretion in denying Quillen's motion to continue the trial.

III. Whether fundamental error resulted when the prosecutor made statements to the jury during *voir dire* and closing argument.

IV. Whether the evidence was sufficient to support Quillen's convictions.

V. Whether Quillen's sentence was proper.

We affirm.

FACTS AND PROCEDURAL HISTORY

On April 13, 2005, then eleven-year-old M.M. was with her family at her Montpelier, Indiana home. M.M.'s mother, Angel, had left to go to the hospital to be with extended family. M.M's sister, Stacy, also left to go to work. After M.M.'s mother and sister left, she was alone with her mother's live-in boyfriend, Quillen.

M.M. sat alone on the couch watching television while Quillen sat at the computer across the room. Quillen told M.M. that there was no hurry and that he was going to finish his computer game. M.M. understood this to mean that Quillen intended to have sexual intercourse with her. M.M. then got up from the couch and began to walk toward the stairs. Quillen grabbed M.M. by the wrist and pulled her into the bedroom he shared with M.M.'s

[1] *See* IC 35-42-4-3.

mother. Quillen took M.M. to the side of the bed, turned her around to face him, removed her clothes, and removed his clothes. Quillen then raised M.M.'s legs onto his shoulders and inserted his penis into her vagina. M.M. told Quillen to stop and that it hurt, to which Quillen told her to "relax." *Tr.* at 279. Quillen continued for ten minutes and then ejaculated on M.M. and on the side of the bed. Quillen then took a piece of clothing and wiped himself and M.M. off and left the room. M.M. went into the bathroom to clean up, and Quillen followed her in. Quillen took a wet washcloth and wiped down M.M.'s breasts and vaginal area. M.M. went upstairs, put on some clothes, and came back downstairs to watch T.V. Quillen came out of the bedroom and gave her a cigarette.

Approximately, two years prior to April 13, 2005, Quillen began inappropriately touching M.M. What started as roughhousing, led to him fondling her breast, and, six months later, progressed to Quillen having regular sexual intercourse with M.M. over a period of time lasting a year to a year and a half. M.M testified that Quillen had sexual intercourse with her at least once a week during January, February, and March of 2005. Nearly every time, Quillen would lead her into his room, and once in his room, place her on the side of the bed, remove their clothes, raise her legs, and place his penis inside her vagina. Nearly every time, Quillen would wipe each of them off, give M.M. a cigarette, and warn her that if anyone ever found out about the cigarette or the sex, both of them would be in a lot of trouble.

M.M. came forward with this information after she decided that Quillen could easily hurt someone else. She was reluctant to do so, however, because she knew Quillen meant a lot to her Mother's happiness.

On April 20, 2005, Montpelier Police Officer Glen Mansfield asked Quillen to come in for questioning. Quillen complied, and, after Officer Mansfield informed him of his *Miranda*[2] rights, Quillen signed a waiver form. Officer Mansfield, who knew Quillen through social events, interviewed him about any contact he had with M.M. Quillen admitted that he may have inappropriately or inadvertently touched M.M in her vaginal area, but that he never fondled her or had sexual intercourse with her. After Officer Mansfield told Quillen that they had recovered a bed sheet and other evidence, Quillen claimed that they might find something because he had masturbated and ejaculated in M.M.'s room before. Quillen also admitted that he purchased M.M. a vibrator because he she was hurting herself with a book that she had used to arouse herself. At one point during the questioning, Quillen requested an attorney, and, in response, Officer Mansfield stopped the interview and left the room. Quillen told the other officers in the interrogation room that he wanted to speak with Officer Mansfield again. Officer Mansfield returned to the room, and Quillen asked to speak to him off the record. Officer Mansfield told Quillen he could not speak to him off the record and that he could no longer speak with him because he requested an attorney. Quillen continued to ask Officer Mansfield questions. Officer Mansfield then proceeded with the interview. After the interruption, Quillen claimed that on the night of April 13, 2005, M.M. caught him masturbating in his room, and that she ran over to him and tried to hug his waist while he

tried to put his pants on. Quillen stated that he told her to get out, but that she would not, and that after her persisting, he fondled her vagina for two to three minutes.

Quillen was ultimately charged with five counts of child molesting, one as a Class A felony, and four as Class C felonies. Quillen hired three attorneys during the pendency of his charges. Quillen also filed several motions relating to discovery, claiming that the State had produced a defective tape of the police interview with M.M. and that the State never produced items seized and returned from the search of the home. Four days prior to the beginning of trial, Quillen moved to suppress the video and audio recording of his interrogation and to continue the trial. The trial court heard argument on the matter and denied his motion to continue, and Quillen later withdrew his motion to suppress. A jury trial was held, and Quillen was convicted as charged.

After a sentencing hearing, the trial court found no aggravating or mitigating circumstances and sentenced Quillen to the advisory thirty years on the Class A felony and the advisory four years each on the remaining Class C felonies with all sentences served concurrently. He now appeals.

DISCUSSION AND DECISION

I. Statements to Police

Quillen claims that the trial court abused its discretion in admitting the statements he made to police after he invoked his right to counsel. The admission of evidence is left to the sound discretion of the trial court, and the decision will not be reversed unless there is a manifest abuse of the trial court's discretion that results in an unfair trial. *Bailey v. State*, 806

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

N.E.2d 329, 331 (Ind. Ct. App. 2004), *trans. denied*. Quillen withdrew his motion to suppress prior to trial and did not object to the introduction of his statements during trial; therefore, relief is only available if the admission of his statements constituted fundamental error. Fundamental error occurs when the error is such a blatant violation of basic rules and principles that it would constitute the denial of the defendant's due process rights. *Boesch v. State*, 778 N.E.2d 1276, 1279 (Ind. 2002). The error must be so prejudicial to the rights of the defendant that it is impossible for him or her to receive a fair trial. *Id*

A defendant's statements prior to trial are inadmissible unless the State can show that the defendant knowingly and voluntarily waived his or her *Miranda* rights. *Cox v. State*, 854 N.E.2d 1187, 1193 (Ind. Ct. App. 2006). A defendant waives his or her *Miranda* rights when, after being duly advised of those rights, he or she proceeds to make a statement without taking advantage of those rights. *Id*. (citing *Morales v. State*, 749 N.E.2d 1260, 1266 (Ind. Ct. App. 2001)). A Fifth Amendment right to counsel is one of the *Miranda* rights available to the defendant, and once it is invoked, the custodial questioning must stop until the defendant's counsel is present or the defendant reestablishes communication with the interrogator and waives his or her right. *Jolley v. State*, 684 N.E.2d 491, 492 (Ind. 1997) (citing *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625, 16 L. Ed. 2d at 721 and *Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981)). A defendant's reinstatement of the previous conversation is not by itself enough to constitute a waiver of his or her right to counsel. *Storey v. State*, 830 N.E.2d 1011, 1018 (Ind. Ct. App. 2005) (citing *Osborne v. State*, 754 N.E.2d 916, 922 (Ind. 2001)). Instead, based on a totality of the circumstances, it must be clear that the defendant knowingly and voluntarily waives

his or her right. *Id.* When we review the "totality of the circumstances," we look at the entire interrogation, and not any single act of the interrogator or the condition of the defendant. *Id.* (citing *Light v. State*, 547 N.E.2d 1073, 1079 (Ind. 1989)). We also "review the record for any evidence of inducement by way of violence, threats, promises, or other improper influences. *Id.* (citing *Berry v. State*, 703 N.E.2d 154, 157 (Ind. 1998)).

When Quillen came in for questioning, Officer Mansfield informed him of his rights, and Quillen signed a *Miranda* waiver form, and in doing so, initially waived his right to counsel. The two spoke for a while, and Quillen admitted that he "inappropriately" and "inadvertently" touched M.M. on one occasion, and claimed that he masturbated and ejaculated in her room and on her bed when she was not present. *State's Ex.* 9. Later, Quillen requested an attorney, and Officer Mansfield immediately stopped the interview. Thereafter, Quillen asked to speak to Officer Mansfield off the record, but Officer Mansfield informed him that he could not do so. Officer Mansfield left the room, and was informed a few moments later by the other officers in the room, that Quillen wanted him to return. Upon Mansfield's return, Quillen continued the conversation. Thereafter, Quillen insisted that he was impotent, but that he did inappropriately touched M.M.'s vagina for two to three minutes after she caught him masturbating.

Based on the totality of the circumstances, Quillen waived his right to counsel both before and after he requested an attorney. At the time Quillen requested an attorney, Officer Mansfield ended the questioning, made record of it, and Quillen voluntarily continued the conversation. Officer Mansfield insisted that because Quillen requested an attorney he could no longer question him, but Quillen voluntarily continued. At no time did Officer Mansfield

coerce, threaten, or make promises in order to induce Quillen to respond. Therefore, the admission of Quillen's statements did not constitute fundamental error.

II. Motion for Continuance

Next, Quillen asserts that the trial court abused its discretion in denying his motions for continuance in the weeks prior to trial. Quillen's motions were not filed with an affidavit and, therefore, are not statutory motions for continuance pursuant to IC 35-36-7-1.[3] The decision to grant or deny a motion for continuance based on non-statutory grounds is left to the discretion of the trial court, and we will not reverse unless there is an abuse of that discretion. *Hamilton v. State*, 864 N.E.2d 1104, 1108-09 (Ind. Ct. App. 2007). An abuse of discretion occurs when the decision is against the logic and effect of the facts and circumstances before the court. *Id.* at 1109. A denial of a continuance is only reversible when the defendant can demonstrate that he was prejudiced by the denial. *Macklin v. State*, 701 N.E.2d 1247, 1250 (Ind. Ct. App. 1998).

Quillen contends that his motions for continuance were based on the prosecutor's failure to deliver him possible exculpatory and impeachment evidence when it did not disclose the police interview contrary to *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* "established that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Saylor v. State*,

[3] IC 35-36-7-1 provides in part:

(a) A motion by a defendant to postpone a trial because of the absence of evidence may be made only on *affidavit* showing . . .

765 N.E.2d 535 (Ind. 2002), *reh'g granted and rev'd on other grounds*. The evidence is considered "material" if there is a reasonable probability that had it been disclosed to the defense, the verdict would be different. *Id.* "A 'reasonable probability' is a 'probability sufficient to undermine confidence in the outcome.'" *Id.* (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985)). To establish a *Brady* violation, Quillen must show that the State suppressed material evidence that was favorable to his defense and that undermines our confidence in the jury's verdict. *Id.* (citing *Denney v. State*, 695 N.E.2d 90, 94 (Ind. 1998)).

Here, Quillen alleged in his motion for continuance that he had not received: a transcript of his interview with Officer Mansfield; an audiotape of the police interview with M.M.; or an inventory of the items searched and seized pursuant to the police's initial search of Quillen and Angel's home. The trial court heard argument in open court on August 17, 2006 and directed the prosecutor to produce the requested discovery. The trial court granted Quillen's motion to continue the suppression hearing to just before trial, but denied Quillen's motion to continue the jury trial. Thereafter, the State produced all outstanding discovery.

Quillen has failed to show that he was prejudiced by the trial court's denial of his motion to continue or that the outcome at trial would have been different had his motion been granted. Quillen had already viewed a copy of the police interviews with both him and M.M. By the time trial began, nearly sixteen months had passed since Quillen was initially apprehended, and Quillen was on his third attorney. Quillen's previous attorney moved to continue the scheduled trial for personal health reasons, not for inadequate production. His final attorney was hired in early May 2006 and had nearly four months to prepare for trial.

Emphasis added.

At no time has Quillen demonstrated that the State prohibited his counsel from reviewing any of the prosecutor's file. Beyond that, Quillen has failed to show any inculpatory or exculpatory evidence that the State possessed and withheld. For these reasons, the trial court did not abuse its discretion in denying his two final motions to continue.[4]

III. Prosecutorial Misconduct

Quillen argues that the prosecutor's comments during *voir dire* and during closing argument amounted to misconduct so grave as to constitute fundamental error. Specifically, Quillen asserts that, "the deputy prosecutor . . . demeaned and ridiculed defense counsel both in front of and outside the presence of the jury, and used closing arguments to launch a personal attach against defense counsel which substantially prejudiced [him]." *Appellant's Br.* at 34.

When reviewing a claim of prosecutorial misconduct, we apply a two-step analysis. *Reynolds v. State*, 797 N.E.2d 864, 868 (Ind. Ct. App. 2003). We must first determine whether the prosecutor engaged in misconduct. *Id.* (citing *Sanders v. State*, 724 N.E.2d 1127, 1131 (Ind. Ct. App. 2000)). We then consider all the circumstances of the case to determine whether the misconduct placed the defendant in a position of grave peril to which he should not have been subjected. *Id.* However, "'[t]he gravity of the peril is determined by considering the probable persuasive effect of the misconduct on the jury's decision, rather than the degree of the impropriety of the conduct.'" *Id.* (quoting *Sanders*, 724 N.E.2d at

[4] Quillen also contends that the State's discovery response denied him effective assistance of legal counsel. *See Strickland v. Washington*, 466 U.S. 668, 684 (1984). However, Quillen does not argue that *his* counsel was ineffective in obtaining or securing specific discovery. Because ineffective assistance of trial counsel claims relate to the performance of a defendant's own counsel, we do not address this issue. *See Thorne v. State*, 429 N.E.2d 644, 647 (Ind. 1981).

1131).

Quillen did not object to the alleged incidents of prosecutorial misconduct at trial. Failure to object to prosecutorial misconduct and to request an admonishment or move for a mistrial, waives a defendant's appellate right, unless the defendant can demonstrate that the misconduct amounted to fundamental error. *Id.* at 868-69. Again, fundamental error occurs when there is a substantial blatant violation of basic principles that deprives the defendant of due process. *Id.* at 869. "The error must have been so prejudicial that a fair trial was impossible." *Id.*

Quillen claims, first, that the prosecutor's statement during *voir dire* constituted misconduct. Particularly, the prosecutor, in introducing himself to the jury, stated:

> A little background about me. Just to be fair, I'll tell you a little about me. As I stated, I am the Chief Deputy Prosecutor. That's kind of a misnomer, because I'm the only Deputy Prosecutor for Blackford County. I serve under Kevin Basey who is the elected Prosecutor, and it's by appointment, so if I don't win, he can come in and fire me if he'd like to. I often invite him to do that. He hasn't taken me up on it yet, so, here I am. . . .

Tr. at 161. And, in questioning a potential alternate juror, the prosecutor stated:

> [Prosecutor]: Mr. Gifford, uhm, how do you feel about being an alternate, potentially being an alternate? Probably one of the, the most thankless jobs on the face of the earth?
>
> Mr. Gifford: I have no problem with that.
>
> [Prosecutor]: Worse than being Deputy Prosecutor during an election.
>
> Mr. Gifford: I'm retired, so, I'm not doing anything.
>
> [Prosecutor]: Uh, you would have to listen to all the witnesses and possibly not get to that point where you would be able to deliberate with everyone else.

Id. at 242.

Quillen also claims that the prosecutor's statements during his rebuttal closing argument amounted to misconduct. Particularly, the prosecutor stated:

> [Defense counsel]'s statement that the child went into the bedroom catching Mr. Quillen in the act of masturbation is nothing more than inflammatory. [Defense counsel] should be ashamed for saying that. He probably not [sic], but should be ashamed. And I apologize to you, because you heard that. You shouldn't have to hear that. [M.M.] is an 11-year old little girl. [Defense counsel]'s statements are without foundation and without evidence. [Defense counsel]'s statement as to police tactics, he has no knowledge. . . . He's trying to explain away facts, explain away the evidence. Minimalize his involvement by saying an 11-year old child humps a book. I think [defense counsel] would join in that based on his last statement that the child saw, she wanted when she walked in to the bedroom . . . . What is Mr. Quillen saying? All I can tell you, I was beating off on her bed. Minimalizing his involvement. Explaining away the evidence. Let's focus on the child, Officer Mansfield. The officer refused to do so. The officer had a lot more class than to show him that in the closing arguments by [defense counsel]. . . . Mr. Quillen is the one that is attempting to explain away the evidence. Mr. Quillen is the one that is attempting to minimalize his involvement. Evidence is live bodies testifying as to what happened to them. The evidence before the Jury presented by the state with the young girl telling what happened to her on April 13th of 2005. [Defense counsel] just wants to say, "Well, it's the girl's fault." Truly a shameful statement. His client is saying that to the police officer in order to mimimalize his involvement. So, an attorney, standing before you, saying "This is the child's fault," shame on you. . . .

Id. at 470-72.

The prosecutor's statements to the jury during *voir dire* did not constitute misconduct. First, the prosecutor was introducing himself and, in doing so, distinguishing himself from the elected prosecutor for the voters in the potential jury pool. Later, the prosecutor's comment to the potential alternate juror that being an alternate has to be the most thankless job in the world and worse than being a deputy prosecutor was not inflammatory nor was it

directed at Quillen. Quillen fails to argue, and we cannot envision how this statement prejudiced him or otherwise unfairly assisted the State's case.

The prosecutor's statements during rebuttal closing argument also did not amount to misconduct. The prosecutor responded to Quillen's closing argument and direct testimony assertion that Quillen did not instigate any inappropriate contact with M.M., but that it was M.M. who interrupted him while he was masturbating and would not leave his bedroom. The prosecutor, both during cross-examination and during rebuttal closing argument, challenged Quillen's credibility with evidence including Quillen's own admission that he inappropriately fondled M.M.'s vagina and inferences that Quillen was attempting to explain away the evidence against him. *See Cooper v. State*, 854 N.E.2d 831, 836 (Ind. 2006) (prosecutor's statement to jury during rebuttal closing argument that defendant lied and "attempted to weave his version of the story into the truth," were not improper). While we do not agree with the prosecutor's statement that defense counsel should be ashamed nor do we find it appropriate and professional discourse, we do not find that the prosecutor's impropriety resulted in Quillen's denial of due process and a fair trial. Therefore, even if the prosecutor's statements before the jury constituted misconduct, none were so grave as to amount to fundamental error.

IV. Sufficiency of the Evidence

Next, Quillen contends that there was insufficient evidence to support his convictions for child molesting. When we review sufficiency of the evidence claims, we do not assess the weight of the evidence or judge the credibility of witnesses. *Stewart v. State*, 768 N.E.2d 433, 435 (Ind. 2002). We look to whether there was probative evidence and reasonable

inferences sufficient for the trier of fact to conclude that the defendant is guilty beyond a reasonable doubt. *Id.*

In order for the jury to find Quillen guilty of child molesting as a Class A felony, the State had to prove that he engaged in sexual intercourse with M.M and that Quillen was at least twenty-one years old at the time and that M.M was under the age of fourteen at the time. IC 35-42-4-3(a). In order for the jury to find Quillen guilty of four separate counts of child molesting as a Class C felony, the State had to prove that he fondled or touched M.M. with the intent to arouse his sexual desires on four separate occasions distinct from the occasion that supported his Class A felony conviction. IC 35-42-4-3(b).

Quillen was convicted based on M.M's testimony and other corroborating evidence. M.M. testified that Quillen had sexual intercourse with her at least once a week in January, February, and March 2005. M.M. also testified that on the evening of April 13, 2005, when Angel and Stacy left the home, Quillen grabbed M.M.'s wrist and pulled her into the bedroom. M.M. testified that Quillen placed her on the side of the bed, undressed her and himself, put her legs over his shoulders, and placed his penis in her vagina. M.M. stated that she told him it hurt and asked him to stop, but that he told her to relax. Ten minutes later he ejaculated on her and on the side of the bed. M.M. testified that he cleaned up and wiped her off. M.M. also testified that Quillen had begun inappropriately touching her nearly two years prior to April 2005. M.M testified that what began as roughhousing, led to Quillen inappropriately touching her breast and vagina, and within months, sexual intercourse.

Quillen's claim of insufficient evidence is merely an invitation to reweigh the evidence and judge the credibility of the witnesses, which we cannot do. The evidence was

sufficient for the jury to find Quillen guilty as charged.

V. Sentence

Lastly, Quillen argues that the trial court abused its discretion in sentencing him to the crimes' advisory sentences because it did not consider his lack of a significant criminal history and his mental health as mitigators. Further, Quillen contends that, based on the nature of the offense and his character, the sentence was inappropriate.

A sentencing decision is within the sound discretion of the trial court. *Edwards v. State*, 842 N.E.2d 849, 854 (Ind. Ct. App. 2006), *trans. denied* (citing *Jones v. State*, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003)). We can review the presence or absence of reasons justifying a sentence for an abuse of discretion, but we cannot review the weight given to those reasons. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007). If the sentence imposed is lawful, this court will not reverse unless the sentence is inappropriate based on the character of the offender and the nature of the offense. Ind. Appellate Rule 7(B).

Quillen asserts that the trial court abused its discretion in failing to consider his lack of a significant criminal history as a mitigating circumstance. Quillen cites *Sherwood v. State*, 749 N.E.2d 36, 40 (Ind. 2001) finding that defendant's lack of significant criminal history is a mitigating circumstance in the medium range. In *Sherwood*, the court applied the then-available independent appellant reweighing of aggravators and mitigators and recognized that the significant lack of a criminal history was a mitigator, but that balanced against the heinousness of the crime as an aggravator, the trial court's concurrent presumptive sentences were appropriate. *Id.* Here, the State argues that Quillen is hardly entitled to a mitigator since the crimes were committed over nearly two years. Both Quillen and the State argue a

particular weight to be applied to the mitigator, which, *Anglemyer* held that appellate courts may not review. *Anglemyer*, 868 N.E.2d at 491. The trial court did not specifically list Quillen's lack of a significant criminal history as a mitigator, but acknowledged it in the record, which we find within its discretion. *Tr.* at 52-54.

Quillen additionally argues that the trial court abused its discretion because it did not consider his mental health as a mitigating factor. Mental illness is a mitigating factor to be used in certain circumstances like a pervasive showing of mental illness throughout trial or when the jury finds defendant to be mentally ill. *See Ousley v. State*, 807 N.E.2d 758, 761 (Ind. Ct. App. 2004). Here, Quillen's mental health was not pervasively demonstrated throughout the record. In both his interrogation and trial examinations, Quillen claimed that he was on antidepressants and that his depression affected his sexuality. However, Quillen has neither argued nor implicitly demonstrated how his depression affected his mental health, or, deductively, how his mental health entitled him to a mitigation of his sentence. Therefore, the trial court did not abuse its discretion in not considering his mental health as a mitigating circumstance.

Quillen's sentence is also not inappropriate. Quillen did not have a criminal history, but he did take advantage of his girlfriend's daughter, someone who saw him as a father figure. Additionally, Quillen's sexual abuse continued over an eighteen-month period, and only lasted so long because M.M. did not want her mother to lose her boyfriend, someone M.M. knew made her Mother happy. The nature of the exploitation and abuse, even in light of Quillen's lack of criminal history, does not render his concurrent advisory sentences inappropriate.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.